STATE OF MICHIGAN

COURT OF APPEALS

PLASTIMATIX, LLC,

Plaintiff-Appellant,

v

RETRO ENTERPRISES, INC.,

Defendant-Appellee.

UNPUBLISHED
June 15, 2006

No. 259686
St. Joseph Circuit Court
LC No. 02-001164-CK

Before: O'Connell, P.J., and Murphy and Wilder, JJ.

PER CURIAM.

Following a bench trial, judgment was entered in favor of defendant, Retro Enterprises, Inc., in this case involving the alleged contract for the sale of a machine. Plaintiff Plastimatix, LLC, appeals as of right from the trial court's judgment. We affirm.

The central issue of the parties' dispute was whether plaintiff and defendant contracted for the sale of a Bodini electric plastic injection molding machine. The transaction at issue was not a normal arms-length business transaction. Ronald Frohriep, the owner of Plastimatix, shipped the Bodini and two Hermastek hydraulic plastic injection molding machines to defendant on or about June 15, 2001. The billing invoices provided that payment was due to plaintiff within 60 days. However, defendant, Retro Enterprises, did not have the funds available, and did not immediately obtain financing for the machines. Defendant was owned by Ronald Whetstone, who was married to Frohriep's daughter, Rhonda, at the time. It is undisputed that the business transaction between the parties was not a usual, arms-length transaction. Defendant eventually paid plaintiff for one Hermastek machine in January 2002, and paid for the second machine in April 2002. Defendant never paid plaintiff for the Bodini. Plaintiff first demanded payment for that particular machine in July 2002, after Whetstone and Rhonda began divorce proceedings. Following a second demand for payment, Whetstone told Frohriep that he did not want to purchase the Bodini. Plaintiff filed suit and alleged that an express or implied contract for the sale of the Bodini existed between the parties. Defendant denied the existence of any contract for the sale of the Bodini. Whetstone testified that defendant agreed to store the machine so Frohriep could show it to other potential buyers. Defendant could not justify buying the machine and did not find it reliable.

On appeal, plaintiff argues that the trial court erred when it determined that the parties did not contract for the sale of the Bodini. We review a trial court's factual findings in a bench trial for clear error, and its conclusions of law are reviewed de novo. MCR 2.613(C); *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). "A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made." *Id.* We give due regard to the trial court's superior ability to judge the credibility of witnesses who appeared before it. MCR 2.613(C); *In re Clark Estate*, 237 Mich App 387, 395-396; 603 NW2d 290 (1999).

Because this dispute arises from the sale or attempted sale of goods, Article 2 of the Uniform Commercial Code (UCC), MCL 440.2101 *et seq*., applies. MCL 440.2102; MCL 440.2105(1). Plaintiff argues that the parties entered into an oral contract for the sale of the Bodini for $91,000. Section 2201 of the UCC provides that contracts for the sale of goods, for a price of $1,000 or more, must be in writing to be enforceable. However, a defendant's liability for payment arises if the defendant accepts the goods despite the lack of a written contract. MCL 440.2201(3)(c); *West Central Packing, Inc v A F Murch Co*, 109 Mich App 493, 500-503; 311 NW2d 404 (1981). Under the UCC, "a contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." MCL 440.2204(1). With respect to the acceptance of goods, the UCC provides:

> (1) Acceptance of goods occurs when the buyer
>
> (a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their nonconformity; or
>
> (b) fails to make an effective rejection (subsection (1) of section 2602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or
>
> (c) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him. [MCL 440.2606.]

Under the UCC, plaintiff could prevail only if the trial court found that defendant orally contracted for the sale of the Bodini, and then accepted the machine pursuant to MCL 440.2606. On appeal, plaintiff argues that the evidence clearly established that defendant accepted the Bodini because it used the machine in a manner consistent with ownership and failed to make an effective rejection of the Bodini. Additionally, plaintiff argues that defendant failed to revoke its acceptance of the Bodini. The testimony of Frohriep, Rhonda Whetstone, and Jim LaLonde generally supported this version of events.

However, we have reviewed the entire record and find that the evidence supports the trial court's ruling in favor of defendant. The parties agreed that plaintiff shipped two Hermastek machines and one Bodini machine to defendant and that defendant obtained financing and paid

for the two Hermastek machines. The remaining testimony presented at trial was contradictory, and this case hinged on a determination of each witnesses' credibility. The trial court had the benefit of hearing the testimony and was able to make a firsthand assessment of the witnesses' credibility. We defer to the trial court's credibility determination. MCR 2.613(C). It determined that Whetstone provided a more credible version of events. His testimony supported factual findings that there was no agreement to buy the Bodini, that he used it only on Frohriep's instruction, that it was available to other buyers, and that he told Frohriep that he did not want it after receiving an invoice, at which time Frohriep told Whetstone that the invoice was just a formality and served to inform creditors about its location. Furthermore, we decline to find a contract implied in law in the present case. Even if defendant received a benefit in this situation, that benefit was conveyed gratuitously by plaintiff, and the evidence supported that plaintiff received a benefit as well. There was no unjust enrichment. *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993). And, where essential elements of the contract were missing, specifically mutuality of agreement and acceptance, an implied contract should not be found. See e.g., *Borg-Warner Acceptance Corp v Dep't of State*, 169 Mich App 587, 590; 426 NW2d 717 (1988), rev'd on other grounds 433 Mich 16; 444 NW2d 786 (1989); *Mallory v Detroit*, 181 Mich App 121, 127; 449 NW2d 115 (1989) (implied contracts must also satisfy elements of mutual assent and legal consideration); *Lawrence v Ingham Co Health Dep't Family Planning/Pre-Natal Clinic*, 160 Mich App 420, 422 n 1; 408 NW2d 461 (1987). The trial court did not err when it determined that no contract existed between the parties.

Plaintiff also argues on appeal that the following factual findings by the trial court were clearly erroneous.

> The principle [sic] corroborating evidence for Mr. Whetstone's testimony is the completely different financing and payments for the two Hermastek machines from the Bodini machine. Although the three machines arrived together with the same invoicing, the Hermasteks were paid off by a bank loan and there was no financing or payment on the Bodini. Only after Mrs. Whetstone filed for divorce was a demand for payment made on the Bodini.

It is undisputed that defendant paid for the Hermasteks with bank loans but did not pay for the Bodini. Moreover, it was undisputed that payment was not demanded until divorce proceedings began. The fact that the machines arrived together is not concrete evidence of a "package deal" on the machines, as argued by plaintiff. Rather, Whetstone provided an explanation as to why the Bodini was shipped. In light of the family relationship between the parties, Whetstone's testimony as to why the Bodini was at defendant's facility was plausible, specifically that Frohriep wanted defendant to use it at the site to demonstrate the Bodini to potential buyers and wanted to store it there. The Bodini had already been used in the same manner at another location. Because the testimony supported the trial court's findings and inferences, we are not left with "a definite and firm conviction that a mistake has been made." *Alan Custom Homes*, *supra* at 512. This was a case where the trial court was presented with conflicting evidence, and we find no basis to reverse its ruling, which finds support in the record.

On appeal, defendant argues that it is entitled to costs and attorney fees because plaintiff's appeal is frivolous and vexatious. Sanctions requested for a vexatious appeal are

governed by MCR 7.216(C)(1), which indicates that a motion for sanctions must be filed pursuant to MCR 7.211(C)(8). MCR 7.211(C)(8) provides that a request in an appellate brief does not constitute an appropriate motion for sanctions. Defendant has not yet filed a proper motion for sanctions at the appellate level. Thus, we cannot substantively rule on the matter in this opinion.

Affirmed.

/s/ Peter D. O'Connell
/s/ William B. Murphy
/s/ Kurtis T. Wilder